Filed 6/29/10 In re E.R. CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| In re E.R., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>E.R.,<br>Defendant and Appellant. | C061399<br>(Super. Ct. No. JV117823) |

After finding that minor E.R. had violated his probation, the Sacramento County Juvenile Court committed him to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) for a maximum of five years and not to exceed age 25. The minor received 109 days of predisposition credit.

On appeal, the minor contends (1) the juvenile court lacked authority to commit him to DJF and the commitment violates due process, and (2) the court failed to properly calculate his

predisposition credits. The Attorney General concedes the latter point. We shall modify the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

***September 2004 Original Wardship Petition***

In July 2004, the minor and two coparticipants burglarized a Sacramento residence taking jewelry, a cellular telephone, video games, and clothing. After the victim and his neighbors confronted the minor's family, the stolen property was returned.

In September 2004, the district attorney filed an original wardship petition pursuant to Welfare and Institution Code section 602 (section 602)[1] alleging that the minor had committed burglary (Pen. Code, § 459). He admitted a related misdemeanor offense of receiving stolen property. (Pen. Code, § 496.) The minor was placed on informal supervision and ordered to perform 100 hours of community service.

***February 2007 Subsequent Petition***

In February 2007, sheriff's deputies responded to a call regarding four juveniles burglarizing a residence. When deputies arrived at the scene they saw four juveniles, including the minor, leaving a residence through a sliding glass door. The minor was searched and stolen property was found on his person.

In February 2007, the district attorney filed a subsequent wardship petition pursuant to section 602 alleging that the

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

minor had committed burglary and had received stolen property. The minor admitted the burglary allegation, and the stolen property allegation was dismissed in the interest of justice. The minor was placed on probation for one year pursuant to the deferred entry of judgment provision of section 790.

***May 2007 Probation Violation***

On four days in April 2007, the minor was truant from school.

In May 2007, the probation department filed *both* a wardship petition pursuant to section 602 *and* a notice of hearing to modify, change or set aside previous orders due to a violation of probation. The wardship petition alleged the minor's name, address, age, birthdate, previous declaration of wardship, and adult relatives, but it contained no further factual allegations. The notice of hearing alleged four probation violations: absence from school, suspension from school, failure to submit to chemical testing, and use of marijuana. The matter was set for a hearing, but the minor failed to appear and a bench warrant was issued.

***June 2007 Subsequent Wardship Petition Pursuant to Section 602***

In June 2007, the minor and two coparticipants robbed a woman outside a drug store in Sacramento. The trio followed the victim outside the store and then approached her as she was loading her purchases into the car. They grabbed her purse, knocked her to the ground, and "took off running." When interviewed, the minor ultimately admitted his presence at the

store, his presence during the robbery, and taking some money from the purse.

On June 29, 2007, the district attorney filed a subsequent wardship petition pursuant to section 602 alleging that the minor had committed the offense of robbery. Following a contested hearing, the juvenile court found the robbery allegation true. On motion of the prosecutor, the probation violation allegations were dismissed. The court then sustained the burglary allegation that previously had been deferred under section 790. The court adjudged the minor a ward of the court, placed him on probation, and committed him to the Youth Center.

***February 2008 Probation Violation***

After the minor completed a Youth Center commitment, he was released to the custody of his father in January 2008. In late January 2008, the father informed probation authorities that the minor had remained away from home for two nights and that his whereabouts were unknown.

In February 2008, the probation department filed *both* a wardship petition pursuant to section 602 *and* a notice of hearing to modify, change or set aside previous orders due to a violation of probation. The wardship petition alleged the minor's name, address, age, birthdate, sex, previous declaration of wardship, and adult relative, but it contained no further factual allegations. The notice of hearing alleged six probation violations: counts I and II, remaining away from home overnight; count III, failing to keep the probation officer advised of his address and telephone number; count IV, failing

to report to the Youth Center; count V, use of the drug ecstasy; and count VI, failing to participate in and complete a program of substance abuse counseling. The minor admitted count I, and the other allegations were dismissed. Probation was then modified to include another Youth Center commitment.

***April 2008 Probation Violation***

In April 2008, the probation department filed *both* a wardship petition pursuant to section 602 *and* a notice of hearing to modify, change or set aside previous orders due to a violation of probation. The wardship petition alleged the minor's name, address, age, birthdate, sex, previous declaration of wardship, and adult relative, but it contained no further factual allegations. The notice of hearing alleged one probation violation: failure to adhere to the conditions of the Youth Center Home Pass Contract. The court dismissed the April 2008 notice of violation of probation and committed the minor to the Sacrament County Boys Ranch.

***December 2008 Probation Violation***

In November 2008, Sacramento Sheriff's Deputy Peyton attempted to stop a car with a nonfunctioning headlight. The car failed to pull over and had to be pursued for a distance. When the car slowed at an intersection, the passenger door opened and the minor got out. He fled on foot and Peyton pursued him. During the foot pursuit Peyton saw the minor make a "funny motion" and heard the sound of a metal object hitting a solid surface. Peyton stopped his pursuit and recovered the

object, which was a loaded pistol. After recovering the weapon, Peyton heard someone jumping over a fence.

Sheriff's Deputy Tamayo responded to the area and saw the minor walking down a residential street. Tamayo ordered the minor to the ground at gunpoint and then took him into custody. Later, Deputy Peyton viewed the minor and identified him as the person who had fled from him.

During a booking search, officers found a baggie of marijuana secreted in his crotch area.

In December 2008, the district attorney filed *both* a wardship petition pursuant to section 602 *and* a notice of hearing to modify, change or set aside previous orders due to a violation of probation. The wardship petition alleged the minor's name and address (by reference to Attachment "B"), age, birthdate, sex, previous declaration of wardship, and adult relative (by reference to Attachment "B"), but it contained no further factual allegations. The notice of hearing alleged two probation violations: count one, unlawful possession of a concealable firearm (Pen. Code, § 12101(a)(1)); and count two, possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)).

In February 2009, count two was amended to allege possession of less than an ounce of marijuana (Health & Saf. Code, § 11357, subd. (b).) The wardship petition incorporated *only* "Attachment B"; it did not refer to the notice of hearing (Form JV-735) or Attachment "A."

Following a contested jurisdiction hearing, the juvenile court found that both counts of probation violation were true by a preponderance of evidence.

At a disposition hearing in March 2009, the juvenile court committed the minor to DJF and fixed the maximum period of confinement at five years, based upon the previous June 2007 robbery adjudication.

**DISCUSSION**

**I.**

The minor contends his DJF commitment is barred by section 733, subdivision (c), and must be vacated. We disagree.

Section 733 provides in relevant part: "A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities: [¶] . . . [¶] (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and *the most recent offense alleged in any petition* and admitted or found to be true by the court is not described in subdivision (b) of Section 707 . . . . This subdivision shall be effective on and after September 1, 2007." (Italics added.)

Robbery is described in section 707, subdivision (b)(3); possession of a concealable firearm and possession of less than an ounce of marijuana are not. (§ 707, subd. (b).)

The court in *In re J.L.* (2008) 168 Cal.App.4th 43 (*J.L.*) determined "that 'the most recent offense' in [section 733,] subdivision (c) refers to an offense alleged in a petition that

is filed under section 602, but not to a probation violation that is alleged in a notice filed under section 777." (*Id.* at p. 58.) The court explained:

"Section 733, subdivision (c), specifically refers to an offense that is alleged in a 'petition.' As explained by the California Supreme Court, '[n]o section 602 case begins until the prosecutor files a *petition* under that statute on the People's behalf. [Citations.] The *petition* states which penal laws were violated and whether the offenses are felonies or misdemeanors. [Citations.]' ([*In re Eddie M.* (2003) 31 Cal.4th 480,] 487, [(*Eddie M.*)] italics added [*by J.L.*].)

"In contrast, section 777 has a '"notice" provision. [Citation.]' [Citation.] The notice provision replaced the 'supplemental petition' that had been contemplated by the statute '[b]etween section 777's enactment in 1961, and Proposition 21's approval in 2000 . . . .' (*Eddie M.*, *supra*, 31 Cal.4th at p. 489.) Our Supreme Court has explained: 'In 2000, Proposition 21 changed the scope of section 777 in section 602 cases. As pertinent here, voters deleted the provision allowing prosecutors to allege probation violations amounting to crimes. Now, for wards or probationers under section 602, section 777 applies . . . [to] a probation violation "not amounting to a crime." [Citation.] [¶] With respect to procedural changes, Proposition 21 replaced the supplemental petition with a "notice" provision. [Citation.] A "preponderance of the evidence" standard now applies. [Citation.] Other new language allows "reliable hearsay evidence" insofar as it would be

"admissible in an adult probation revocation hearing [under] *People v. Brown* [(1989) 215 Cal.App.3d 452] and any other relevant provision of law." [Citation.]' (*Eddie M.*, *supra*, 31 Cal.4th at p. 491.)

"The California Supreme Court has further explained that 'by limiting section 777[, subdivision] (a)(2) to matters "not amounting to . . . crime[s]," Proposition 21 only affected the manner in which such violations are officially treated under the statute. Section 777[, subdivision] (a)(2) covers all probation violations alleged as such, including those that are criminal in fact.' (*Eddie M.*, *supra*, 31 Cal.4th at p. 502.) Nonetheless, 'juvenile probation violations, like their adult counterparts, do not involve criminal guilt. While section 777 continues to permit dispositional change for probation violations involving criminal conduct, the "not amounting to a crime" limitation precludes prosecutorial use of the statute to plead and prove the violation *as* a crime. Thus, unlike criminal convictions or section 602 offenses, section 777 adjudications do not entail the "stigma of a finding that [the juvenile] violated a criminal law." [Citation.] Nor do such probation violations trigger other collateral consequences associated with convictions or section 602 adjudications. [Citation.] Because section 777 involves no formal criminal charge, the reasonable doubt standard need not constitutionally apply.' (*Eddie M.*, *supra*, 31 Cal.4th at p. 506.) Additionally, 'section 777 follows the adult scheme insofar as probation violations do not trigger a term of confinement any longer than the maximum term for the

underlying crime. [Citations.] By this measure, section 777 makes no unfavorable penal change, and the preponderance standard can apply.' (*Eddie M.*, *supra*, 31 Cal.4th at p. 506.)

"In sum, 'Proposition 21 transformed section 777[, subdivision] (a)(2) into a probation violation procedure in which *no* criminal offense can be alleged.' (*Eddie M.*, *supra*, 31 Cal.4th at p. 508.) 'Even if criminal in fact, new misconduct may be treated, under section 777[, subdivision] (a)(2), only as a probation violation. If a violation is found, the violator may, at most, receive a more restrictive juvenile placement within the original maximum term.' [Citation.]" (*J.L.*, *supra*, 168 Cal.App.4th at pp. 58-60, fn. omitted.)

*J.L.* concluded: "In view of the different procedures in a proceeding under section 602 as compared to a proceeding under section 777, including that the former is initiated by a petition while the latter is initiated by a notice, and the constitutional distinctions between alleging that a crime has been committed as compared to alleging that probation has been violated, we conclude that the reference to a 'petition' in section 733, subdivision (c), refers to a petition that is filed under section 602 but not a notice filed under section 777." (*J.L.*, *supra*, 168 Cal.App.4th at p. 60.)

We agree with *J.L.* on this point. We also note that, in enacting a statute such as section 733, the Legislature is deemed to have been aware of statutes and judicial decisions already in effect and to have enacted the new statute in light thereof. (*People v. Hernandez* (1988) 46 Cal.3d 194, 201; *People*

*v. Overstreet* (1986) 42 Cal.3d 891, 897.) Thus, when it enacted section 733 in 2007, the Legislature was deemed to have been aware of the changes that Proposition 21 had made to section 777 in 2000 and that *Eddie M.* had described in 2003. (*Eddie M.*, *supra*, 31 Cal.4th at pp. 486-491, 502-508.) Thus aware of Proposition 21 and *Eddie M.*, the Legislature could not reasonably have relied on the single word "petition" to mean *both* a juvenile wardship petition filed pursuant to section 602 *and* a section 777 notice of hearing.

Acknowledging *J.L.*, the minor reasons that his "most recent offense[s] alleged in any petition" are the December 2008 possessions of the firearm and marijuana, not the June 2007 robbery. (§ 733, subd. (c).) He claims this is so because "the prosecution elected to file a section 602 petition alleging crimes as violations of probation. No section 777 notice was filed in connection with this last petition." We disagree.

As noted, in December 2008, the district attorney filed *both* a wardship petition pursuant to section 602 (§ 602; form JV-600) *and* a notice of hearing to modify, change or set aside previous orders due to a violation of probation (§ 777; form JV-735). The amended documents filed in February 2009 similarly consisted of *both* a petition *and* a notice. The minor's argument that "[n]o section 777 notice was filed in connection with this last petition" is incorrect; the form JV-735 notices expressly cited section 777 as the relevant authority.

Moreover, nothing in the record suggests that the form JV-735 was intended to function as "a section 602 petition," which

ordinarily is the purpose of form JV-600. Instead, the record suggests the opposite--that the form JV-600 was intended to function, if at all, as a cover sheet for the form JV-735 notice of probation violation. We address the two forms.

The form JV-600 consisted of pages 1, 2, and "Attachment B," which listed the names and addresses of the minor and an adult relative. The form made no reference to form JV-735 or to "Attachment A," both of which followed.

On page 1, the form JV-600 alleged the minor's name (by reference to Attachment "B"), age, birthdate, sex, and previous declaration of wardship. On page 2, the "Petitioner request[ed] that the court find these allegations to be true." The form neither alleged any inappropriate conduct by the minor nor requested that any such allegation be found true by the court.

Instead, the only allegation of inappropriate conduct appeared on the form JV-735 notice of hearing. The allegation stated: "VIOLATION OF PROBATION COUNT ONE [¶] That said minor, [E.R.], violated probation in that he failed to obey all laws when on or about November 29, 2008, he did commit a felony namely: a violation of Section 12101(a)(1) of the Penal Code of the State of California, in that said minor being a minor, did unlawfully possess a pistol, revolver and firearm capable of being concealed upon the person. [¶] VIOLATION OF PROBATION COUNT TWO [¶] That said minor, [E.R.], violated probation in that he failed to obey all laws when on or about November 29, 2008, he did commit a misdemeanor namely: a violation of Section 11357(c) of the Health & Safety Code of the State of

California, in that said minor did unlawfully possess more than 28.5 grams of marijuana."

There is no indication of intent to incorporate this allegation into the form JV-600, in order to flesh out a wardship petition pursuant to section 602. Rather, because the form JV-735 is not captioned (except for the case name and number), the only evident intent is to incorporate the captioned but otherwise vacuous Form JV-600 into the form JV-735 notice. Indeed, this same pleading technique is evident throughout the various allegations of probation violation. The technique is distinguishable factually from *In re M.B.* (2009) 174 Cal.App.4th 1472 (*M.B.*), in which *both* a probation violation *and* a criminal charge were alleged on the same page of a pleading entitled "JUVENILE WARDSHIP PETITION WELF & INST CODE 602/777." (*Id.* at p. 1476.)[2]

Moreover, the record demonstrates that the December 2008 filing was litigated as a probation violation, not as a wardship

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[2] In *V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, the majority held that "[d]ismissal of the most recent *petition* in order to reach back to an earlier *petition* containing a DJF qualifying offense would be contrary to the unmistakable plain language of section 733[, subdivision] (c). It would frustrate the legislative policy expressed by the language of section 733[, subdivision] (c)." (*Id.* at p. 1468, italics added.) The majority was referring to dismissal of a subsequent wardship petition in order to reach back to an earlier wardship petition. (*Id.* at pp. 1459-1460.) Here, in contrast, the pleadings subsequent to the June 2007 robbery were effectively form JV-735 notices, not form JV-600 wardship petitions. Moreover, no pleading was dismissed in order to render an earlier pleading as the most recent offense.

adjudication. At the appearance on December 16, 2008, the referee described the proceeding as involving a "violation of probation." At the next appearance on February 19, 2009, the referee stated that "the minor is here due to a violation of probation." Then, after the December 2008 pleading had been amended, the referee stated: "Court will dismiss violation of probation filed December 2nd, as superseded by the violation of probation petition filed today . . . ."

At the outset of the contested hearing on the February 2009 amended pleading, the juvenile court remarked: "We're on for a hearing on a violation of probation petition that was filed relative to the minor []." The court noted that the minor's most recent sustained petition was a "second degree 211" "back in 2007."

At the prosecutor's request, the juvenile court took judicial notice of the fact that the minor was on probation with an "obey all laws" clause.

At the hearing, defense counsel asked to be provided court records of the prior robbery adjudication. This exchange followed:

"[DEFENSE COUNSEL]: I want to make sure that that really was the last sustained petition as -- last actual charge, as opposed to burglary, which could make a big difference.

"THE COURT: Yes, in this case it would make a big difference."

Following the presentation of evidence, the prosecutor argued somewhat ambiguously that he had proved his case "beyond

a preponderance of the evidence." Shortly thereafter, this exchange occurred:

"THE COURT: By the way, Mr. [Prosecutor], now, even though the VOP's are charged as crimes, but the burden of proof is still by preponderance of the evidence. In other words, the VOP alleges two crimes, so to speak. But you are saying that the burden of proof is still by preponderance because of the VOP?

"[THE PROSECUTOR]: Yes, your Honor."

Following the arguments of counsel, the court stated: "After hearing all the evidence, I think that there are -- you know, the evidence on both counts, I believe, is enough to support the preponderance [] standard in this case. [¶] . . . [¶] So I'm satisfied that as to both counts, the district attorney has met his burden by a preponderance. I want to sustain both counts, find the minor did violate his probation as charged."

Thus, not only was the December 2008 filing not intended to be a section 602 wardship petition, it also was not adjudicated as one. Had the filing been litigated as a wardship petition, the standard of proof would have been beyond a reasonable doubt, not a preponderance of evidence. (See § 777, subd. (c).) The minor's claim that "in the present case[], the prosecution filed a section 602 petition, not a section 777 notice," is incorrect. His claim that the two possession counts were the most recent offenses alleged in any section 602 petition has no merit.

The minor may be understood to contend that in applying section 733, the court should look not simply to the minor's

most recent section 602 petition but to his most recent *behavior*. Thus, "[i]f that most recent behavior is not serious, then commitment to the DJF is not permitted."

The minor's argument creates the absurdity that was rejected by the court in *In re M.B.*, *supra*, 174 Cal.App.4th at page 1477: "It is unlikely that the Legislature intended always to bar DJF commitments for juveniles who commit DJF-eligible offenses, who are given a second chance via probation, and who fail to make good on that second chance. . . . *The Legislature could not have intended that juvenile court judges be forced into a choice of either sending a DJF-eligible ward to DJF immediately or ordering probation and then forfeiting the threat of a DJF commitment later if the ward violates probation*." (Italics added.) We decline to construe section 733, subdivision (c), in an absurd manner that forces juvenile courts to make this choice. (E.g., *People v. Wagner* (2009) 45 Cal.4th 1039, 1057.)

Having rejected the minor's argument that the juvenile court acted contrary to section 733, subdivision (c), we also reject his contention that its state law error violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

**II.**

Lastly, the minor contends, and the Attorney General concedes, the judgment must be modified to award him 560 days of predisposition credit. We accept the Attorney General's concession.

The minor is entitled to predisposition credit for any time spent in custody attributable to the offense for which he was ultimately committed to DJF. (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

At the disposition hearing, the juvenile court mistakenly believed that the minor was to be committed for the 2004 first degree burglary adjudication, which predated the robbery adjudication. The probation officer responded that the minor was entitled to 109 days of predisposition credit, perhaps attributable to the 2004 burglary.

After the conclusion of oral proceedings at the disposition hearing, the juvenile court recognized the error and appended the following to the disposition minute order: "In reviewing the DJF commitment at the conclusion of proceedings, the Court ordered the minute order amended to reflect minor is committed on the PC 211 offense for the confinement term of 5 years, not the PC 459 offense for a term of 6 years as previously stated on the record."

The formal DJF commitment order then was executed to show a commitment based upon the robbery offense, the most recent offense alleged in any wardship petition filed pursuant to section 602. Although the commitment offense was changed, the award of predisposition credit was not.

Thus, custodial periods attributable to the minor's robbery offense include not only the time from his arrest for robbery until his initial discharge from the Youth Center approximately six months later, but also time served for several probation

violations. The minor has computed the custody credit as 560 days, and the Attorney General does not challenge his computation. We shall modify the judgment to award the minor the additional credit.

**DISPOSITION**

The judgment is modified to award the minor 560 days of predisposition credit. As so modified, the judgment is affirmed. The juvenile court is directed to amend its dispositional order and its commitment to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. The court shall forward certified copies of both documents to that agency.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.